

JUDGMENT AND ORDER (ORAL)

Heard Mr. D. Das, learned counsel for the petitioner as well as Mr. B. B. anerjee, learned counsel for the respondent No. 8. I have also heard Mr. S. Bani k, assisting Mr. A.K. Goswami, learned Sr. Counsel and Standing Counsel, KAAC as well as Ms. R. Chakraborty, learned State Counsel. The petitioner No. 1, a business firm, represented by the petitioner No. 2 is aggrieved by the decision of the authority to withdraw the contractual work allotted to it.

2. Pursuant to the notice inviting tender (NIT) dated 26.6.2000 (Annexure-I) issued by the Government of Assam in the Irrigation Department, the petitioner submitted its tender. The work involved is Borjan Composite Irrigation Scheme (CONST) of Head Work and its Appurtenant works in Karbi Anglong Disitrc. The approximate value of the work is Rs. 18,07,71,921/-. The time of completion of the work was three working seasons from the date of issue of the formal work order.

3. The petitioner was offered the contract by Annexure-IV letter dated 25.9.2000 with the direction to deposit earnest money of Rs. 42,64,603/- and to sign the tender agreement. The petitioner accepted the offer by Annexure-V communication dated 10.1.2000 and deposited the earnest money etc. and executed the agreement. By Annexure-VI letter dated 30.11.2000, the petitioner, upon its acceptance of the contract was directed to start the work within 7 days from the date of issuance of the work order. It was indicated that upon its failure to do so, the contract agreement would be rescinded and the earnest money would be forfeited. Schedule of items of work and rates etc. were also enclosed. It was made clear that the work allotted must be completed in all respect within the fixed time schedule. The petitioner was also directed to submit the work programme as per time schedule.

4. Throughout the writ petition, the petitioner has stated about the contractual obligation of the respondents. It has been stated that due to not making available the advance payment, the progress of the work suffered. It has also been stated that since necessary approval towards undertaking the work was conveyed at a much later stage, the petitioner was not responsible for non-completion of the work within the time schedule. Various other factors, such as activities of the militants, Bandh calls by various organization etc. has also been indicated to be responsible for slow progress of the work. In this connection, the petitioner has annexed certain documents.

5. By Annexure-XIII letter dated 4.11.2005 issued by the Assistant Executive Engineer, the petitioner was requested to gear up the works so that the physical progress could be achieved in time. This letter was followed by Annexure-15 letter dated 19.8.2006 addressed to the petitioner by the Executive Engineer, Karbi Anglong Division (Irrigation) expressing displeasure to the petitioner on its failure to make progress in the work. It was also indicated that the labour strength of the petitioner was very poor and that certain machineries remained unoperable. The petitioner was also informed that the Site Agent did not pay attention for repairing the machineries and that quantity of collected materials was very scanty comparing the volume of the works. The petitioner was requested to gear up the works.

6. The petitioner by its Annexure-XVI letter dated 20.3.2007 expressed its difficulties in making progress in the work due to the factors mentioned in the letter. The petitioner also requested to release some payment on early date. This

s letter was written in reference to the letter No. KADI/MI/16/653 dated 15.3.2007. By yet another letter dated 18.6.2007 (Annexure-XVIII), the petitioner informed the Executive Engineer that it has carried out substantial volume of the work and that it was suffering from fund crunch due to non-release of advance payment. In the letter, the petitioner acknowledged receipt of Rs. 4,89,99,997/-.

7. Again by Annexure-XX letter dated 5.7.32007, the petitioner requested the Additional Chief Engineer, in reference to his letter dated 12.6.2007 for making further payment. In this letter various factors towards slow progress of the work were indicated. Thereafter by the impugned letter dated 12.7.2007, issued by the Additional Chief Engineer and addressed to the petitioner, the decision of the authority to withdraw the work allotted to the petitioner as per terms and agreement of contract was conveyed. The petitioner was requested to attend the work site within 7 days for taking final measurement of the work executed by it so far to finalize the incomplete final bill. It was indicated that in case of failure to attend the site, exparte measurement would be taken and the same would be final.

8. The respondent No. 8 has filed affidavit-in-opposition denying the contentions raised in the writ petition. He has also questioned the maintainability of the writ petition. Upon a reference to the clauses in the contract agreement, it is the stand of the respondent No. 8 that the writ petitioners were aware that if the department failed to supply cement/steel for some reasons or other, the burden would be on the contractor to procure the same for completion of the work. It has been stated that the petitioners have been paid substantial amount and inspite of that they have stopped the work. It has been indicated that for early completion of the work atleast 150/200 labourers are required every day, but the petitioners engaged only 10/12 labourers.

9. In the affidavit, the respondent No. 8 has stated that even after 7 years of awarding the contract, the petitioner could achieved only 20% of the work upto 3.1.2004 as against the stipulated target date, which is 15.5.2003. It has been stated that the petitioner the never applied for extension of time to complete the work. In the affidavit, the respondents have disclosed the fact that fresh tender has been issued on 2.8.2007 fixing the last date as 31.8.2007. The respondents have rebutted the claim of the petitioner in the following manner:

8. That with regard to the statements made in paragraphs 8 and 9 of the writ petition the deponent states that the petitioners were aware of their obligation to complete the project within the time stipulated as agreed by the parties. The petitioners were paid substantial amount on 18.3.2006 and 4.5.2006 and even thereafter they have stopped the work. The work in question requires 150-200 labours every day to complete the work whereas they had engaged only 10-12 labourers which can be attributed to the department for non-completion of the project within the time stipulated. The question of ethnic violence cannot be a ground for non-completion of the project since the ethnic clash was for a period of one month in the year 2005 therefore the facts pleaded fails and no interferes is required in the facts and circumstances of the case.

9. That with regard to the statements made in paragraphs 10 and 11 of the writ petition the deponent states that the facts averred has no firm foundation because during the relevant years the irrigation Department had successfully executed 47 Nos. of centrally sponsored minor irrigation schemes without any law and order problem and the facts as averred would reveal that to cover up their own lapses these averments have been made which the Hon'ble Court may not like to adjudicate upon these averments.

The deponent further states that the government of India had sanctioned the scheme vide order dated 28.10.2005 and even after two working season was elapsed. The petitioners were aware that the payment is assured the petitioners would have

progressed the work upto 66% which is not the case in hand and therefore the contract had to rescind and no grievance can be made against the impugned order dated 12.7.2007 in the facts and circumstances of the case.

10. That with regard to the statements made in paragraphs 12, 13, 14 and 15 of the writ petition the deponent states that the joint measurement in regard to progress of the work executed by the petitioners would go to show only 24% for which an amount of Rs. 490.00 lakhs had been paid and the remaining balance of Rs. 27.00 lakhs is yet to be paid.

The deponent further states that the department had received only Rs. 720.00 lakhs from the State Government till date which is allotted against three other components as well as for Headwork also. The other three components of work were not allotted to the petitioners. However, the Government of India has released the 2nd installment of fund recently amounting to Rs. 1018.00 lakhs which is yet to be released to the project authority by the State Government. The department has yet to submit the proposal to the Government for release of the fund due to present status of the execution of Headwork. The petitioners having failed to execute the balance work within the stipulated period in spite of several notices the technical advisory committee has no other option but to rescind the contract and hence no prejudice has been caused to the petitioners. The letter under reference dated 30.8.2007 relates to joint measure of the work which has been done in presence of parties. The value of works executed as per Joint measurement stands to Rs. 517.00 lakhs out of which Rs. 490.00 lakhs has been paid to the petitioners and the same has been acknowledged by the petitioners.

11. That with regard to the statements made in paragraphs 17 and 18 of the writ petition the deponent states that the petitioners having failed to execute the work in spite of several notices in writing the Government has to complete the balance work for the greater interest of the public, more particularly the interest of tribal community. Considering the upliftment of the poor tribal community, the Union of India has also given priority in sanctioning the scheme and the said benefit has been misused by the petitioners resulting in invocation of clause 3 (e) of the tender agreement which reads as follows;

The decision to rescind the contract will absolutely rest on the Government. Therefore once the contract has been rescinded in the public interest, no writ would lay seeking setting aside the impugned order in the facts and circumstances of the case.

10. In the affidavit, the respondents have annexed the letters addressed to the petitioner from time to time for early completion of the work. The letters have been annexed to rebut the contention of the petitioners that they were regularly not informed of any slow progress being made. The letters have been annexed as Annexure-A series, which includes the letter dated 15.3.2007 at page 20 of the affidavit. This letter is specifically mentioned in view of the stand of the petitioner in Misc. Case No.3395/2007 filed on 5.9.2007 claiming that the same is an afterthought. This Misc. case has been filed seeking amendment to the writ petition to incorporate the facts revealed from the affidavit-in-opposition, which according to the petitioners, they were unaware of.

11. In the above context, the statements made in paragraphs - II, III and 17 A of the Misc. Case are quoted below:

II. That the petitioners humbly state that when the respondent No. 8 had served the affidavit-in-opposition to the petitioners, then only the petitioners had come to know that the respondent authorities have initiated a fresh process and a Notice Inviting Tender has been initiated on 02/08/2007 fixing 31/08/2007 as the last date for submission of Tender. Furthermore, the respondent No. 8 had alleged that a final Termination Notice was issued to the petitioners on 15/03/2007,

on which the petitioners stoutly denies the veracity of the said Termination Notice as the impugned termination Notice has now been averred as a mere afterthought by the respondent authorities.

III. That the petitioners humbly states that certain new developments of the Fresh Notice Inviting Tender dated 02/08/07 being initiated by the respondent No. 8 and the so-called final Termination Notice issued to the petitioners on 15/03/2007 warrants a strong rebuttal from the petitioners which could not be incorporated in the submissions and the prayer portions of the Writ Petition (C) No. 4098 of 2007 by the petitioners.

17. A That the petitioners humbly states and submits that with regard to the issue of notice of termination being served upon the petitioners, the petitioners would like to clearly amplify the fact that the 'so-called' final notice dated 15.03.2007 is not in sync with the principles of administrative fairplay as the time period between the final notice and the Withdrawal letter dated 12.07.2007 is nearly four months in which period the petitioners made a lot of representations to the respondent authorities without even evoking a response in an official manner from the respondent authorities. In fact the termination was resorted to by the respondent authorities only to avoid making payments of the petitioner's bill lawfully owed and payable to him when they realized that the measurement book which was prepared in the Office chamber of respondent No. 8 did not tally with the actual scenario prevailing at the site. Furthermore, the purported notice of termination does not even have a authenticated signature of the signatory, inscribed therein which further cast a doubt over the genuineness of the same.

12. From the above averments coupled with the submissions made by Mr. D. Das, learned counsel for the petitioners, it is the stand of the petitioners that the letter dated 15.3.2007 was never issued to the petitioners and the same is an afterthought. The petitioners have even questioned the signature in the letter dated 15.3.2007.

13. In view of the above stand of the of the petitioners Mr. B. Banerjee, learned counsel representing the respondent No. 8 was requested to produce the records, which he has produced. Contrary to the stand of the petitioners that they were not served with the letter dated 15.3.2007, the records have revealed that they not only acknowledged the same but also furnished reply by their letter dated 20.3.2007, copy of which has been annexed to the writ petition as Annexure-XV I. However, apart from the aforesaid stand in Misc. Case No. 3395/2007 coupled with the oral argument of the learned counsel for the petitioner, in the writ petition also there is no mention of the letter dated 15.3.2007.

14. The above aspect of the matter apart from leading to the irresistible conclusion that there is suppression of material facts with the sole purpose of misleading the Court, which the petitioner has succeeded by way of getting an interim order, has a significant bearing. By the said letter dated 15.3.2007 of the Executive Engineer, the petitioners were asked to take proper action in time. It was also intimated that upon failure to do so, the matter would be referred to the higher authority for completion of the work through other agencies at the own risk and cost of the petitioners. This vital document has been withdrawn from the Court in moving the writ petition. Not only that, the petitioners have even questioned the very existence of the same with the signature therein describing the same to be an afterthought unmindful of the fact that the petitioners duly responded to the same by submitting their Annexure-XVI reply dated 20.3.2007 without any such allegation. Although, the letter dated 20.3.2007 has been annexed to the writ petition, but there is no statement relating to the notice dated 15.3.2007 and the same has been projected as if the petitioners wrote the same of their own.

15. The records produced by Mr. B. Banerjee, learned counsel for the respondent

ent No. 8 have revealed that the petitioners were issued with umpteen number of letters asking them to complete the project early, to which the petitioners also responded. Way back on 25.6.2006, the petitioners were intimated that the respondents were not satisfied with the progress of overall works. It was pointed out that the Department was not satisfied with the manpower and machineries engaged. Such displeasure was conveyed by letters dated 31.8.2006, 11.9.2006 etc. The petitioners also responded to the letter dated 31.8.2006 by stating that the matter had been sorted out and the progress in the work would be expedited.

16. The above letters were followed by further letters dated 15.11.2006, 30.11.2006 etc. intimating the petitioners about virtual no progress of the work in absence of sufficient numbers of manpower and machineries. In fact the entire records are full of such letters, which the petitioners have not highlighted in the writ petition for obvious reason. On these scores alone, the writ petition is liable to be dismissed. However, I have examined the matter on merit as well.

17. Much have been said about approval of the work and non-furnishing of required fund, unmindful of the fact that irrespective of the formal approval, the petitioners were to start the work within 7 days from the date of issue of the work order as indicated in Annexure-6 letter dated 30.11.2000. The work was to be completed within 3 working seasons, which is long over. As regards the plea of non-furnishing of fund same is not at all tenable. Clause 28 of the agreement states that no escalation will be allowed in any item of work on account of any increase in the cost of leaving index or price index of material upto 3 working seasons. Further as noted above, the petitioners have been paid substantial amounts on 18.3.2006 and 4.5.2006, but even thereafter they virtually stopped the work. In paragraph 10 of the affidavit, the respondents have stated about the measurement of the work done in presence of the parties. The value of the works executed as per joint measurement stands at Rs. 517 lakhs, out of which Rs. 490 lakhs has already been paid to the petitioners. Even if, the date of formal approval of the work is taken into account then also two working seasons are already over and now the third season is at the threshold.

18. Mr. Banerjee, learned counsel for the respondent No. 8 has referred to the decision of the Apex Court reported in AIR 2003 3823 (National Highway Authority of India Vs. M/s Ganga Enterprises). He has also referred to the decision of the this Court reported in 2006 (4) GLT 441 (AIA Enterprise Vs. Gauhati Metropolitan Development Authority). In both the decisions it has been held that in a claim arising out of breach of contract being a contractual dispute, writ petition would not be maintainable, In the later decision it has been held by this Court that in case of cancellation of contract, remedy, if any, would be by way of identifying the loss and definitely not by revival of the contract. Apart from the above, the contract agreement itself provides for resolution of disputes through arbitration.

19. For all the aforesaid reasons, I do not find any merit in the writ petition and consequently it is dismissed. Interim order passed earlier stands vacated.

20. Writ petition is dismissed. There shall be no order as to costs.